

IN THE MATTER OF ARBITRATION BETWEEN

ALLINA HOSPITALS & CLINICS	)	
ABBOTT NORTHWESTERN HOSPITAL	)	
“Employer”	)	FMCS CASE NO. 050425-55384-7
	)	
AND	)	Termination
	)	Yoseph Petros
SEIU LOCAL NO. 113	)	
“Union”	)	

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: March 27, 2006; Minneapolis, MN

DATE OF RECEIPT OF POST-HEARING BRIEFS: April 28, 2006

APPEARANCES

FOR THE EMPLOYER: Paul J. Zech, Attorney  
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Yoseph Peters, Grievant  
Karmen Omloff, Business Agent

THE ISSUE

Was the Grievant discharged for just cause? If not, what is the appropriate remedy?

## INTRODUCTION

This arbitration is submitted pursuant to Article 2 (Grievance and Arbitration Procedure) and Article 9 (Discipline and Discharge) of the contract between Allina Hospitals & Clinics d/b/a Abbott Northwestern Hospital ("Employer" or "Abbott") and SEIU Local No. 113 (Union). The grievance arises out of the termination of Yoseph Petros ("Petros" or the "Grievant"), who was employed by Abbott as a parking ramp cashier.

In early 2004, the Employer's internal audit services conducted a routine audit in the Parking/Transportation Department ("Department"). In March 2004, the services issued a report making recommendations and the Department began to perform cash audits. Because management discovered a number of cash handling errors during the audits, they initiated an Integrity audit with the intent to ensure that cashiers were fulfilling their job duties in an honest manner.

In conducting the Integrity audit, Randy Huskamp, the cashiers' supervisor, randomly selected a handful of cashiers and added money to each cashier's cash box on multiple occasions. The Grievant, who was one of the cashiers randomly selected, was missing the extra cash on all four occasions the money was added to his cash box. Consequently, Abbott terminated the Grievant's employment for theft.

## RELEVANT CONTRACT PROVISIONS

### ARTICLE 1

#### UNION REPRESENTATION RECOGNITION

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(J) MANAGEMENT RIGHTS: Except as specifically limited by the expressed provisions of this Agreement, the management of the Hospital, including but not limited to, has the right to hire, layoff, promote, demote, transfer, discharge or discipline for just cause, require observance of reasonable Hospital rules and regulations direct the working forces and to determine the materials, meetings and the type of service provided, shall be deemed the sole and exclusive functions of management.

### ARTICLE 9

#### DISCIPLINE AND DISCHARGE

(A) NO DISCHARGE WITHOUT JUST CAUSE: The Employer shall not discharge or suspend an employee without just cause. Drunkenness on the job, bringing intoxicating liquor on the premises, use of drugs or dishonesty or infraction of rules directly affecting the patient, comfort or safety shall be considered grounds for discharge.

(Joint Exhibit 1)

## FACTS

Abbott is a non-profit hospital and maintains parking ramp services, similar to those provided by others in downtown Minneapolis and St. Paul, for its patrons and guests. The parking ramps are operated by Abbott's Parking/Transportation Department. During the relevant time, Pete Huber, Allina's Facility Operations Manager, managed the Department with the help of the cashier supervisor, Randall Huskamp.

When a customer drives into one of the parking ramps, he or she is required to obtain a ticket. The Department utilizes cashiers to receive payment from customers leaving the parking ramp. On average, cashiers, who work a six hour shift, such as the Grievant, service up to 400 customers per shift.

Because Cashiers handle up to a \$1,000 in cash per day, the position demands honesty. In an attempt to properly account for the funds and to deter theft, the Department utilizes a cash management system, which includes a method for cashiers to balance their cash box on a daily basis and the permanent assignment of a cash box to each. Each day, the cashiers start with \$200 cash. While working, the cash box is maintained directly in front of the cashier in the booth. The only time a cashier does not have sole possession of the cash box is during an audit and the cashier's 20 minute break. During the break, a "break" cashier performs the relieved cashier's duties.

At the end of their shift, cashiers balance their cash box by comparing the register tape from the till and the tickets with the value of the vouchers and the amount of cash in excess of the start-up funds. Any adjustments must be documented on the Cashier Report. If the cashier is over, the overage must be recorded and deposited.

After the cashier balances the cash box at the end of the shift, the cashier returns the locked cash box to a personal safe. Huskamp was the only other person that had access to the cashiers' personal safes.

The Grievant began his employment with Abbott as a shuttle operator making \$14.00 an hour. In 2004, Abbott discontinued its shuttle service. As a result, shuttle operators lost their job unless they applied for another position. The Grievant did not seek another position.

A couple of months later, however, he began to seek reemployment with Abbott and was rehired. The Grievant soon became a full-time cashier making just over \$10.00 per hour.

The Grievant testified he was upset with Abbott for paying him roughly four dollars an hour less than he made as a shuttle operator. Supervisors continually informed the Grievant that the reason he was making less as a cashier was because it was different positions with a different pay structure. The Grievant never seemed to be able to grasp the concept. Even at the hearing, the Grievant appeared bitter about this perceived pay inequity.

In early 2004, Allina's internal audit services performed a routine audit of its Parking/Transportation Department. In March 2004, the services issued a report setting forth numerous

recommendations for the Department. One including that the Department perform periodic surprise counts of the cashiers' cash boxes.

While conducting the recommended cash audits, the Department identified frequent unexplained cash handling errors. As a result, Huber, Huskamp and Kevin McKenna, an Abbott Human Resources Specialist, developed the Integrity audit to ensure that cashiers, in general, were properly performing their job duties. Huskamp, who reported directly and worked closely with Huber throughout the audit, implemented the Integrity audit in February and March 2005. The Integrity audit involved Huskamp depositing additional money, which was accounted for by a receipt, into the randomly selected cashiers' cash boxes either before or after the cashiers' shift or during the day while conducting a cash audit. Then, after the cashier's shift or before the cashier's next shift, Huskamp would review the cashier's receipt from the till, the cashier's Cashier Report, and deposit to determine whether the cashier properly accounted for the additional money inserted into the cash box. Huskamp documented every step in the audit process and kept the Integrity audit a secret from other Abbott employees.

The Department randomly selected seven cashiers for the Integrity audit. The Grievant was one of the cashiers selected. Consequently, Huskamp began the above-described process with the Grievant's cash box in February 2005.

On February 1, 2005, he added \$10.00 to the Grievant's cash box before his shift. Before the Grievant's next shift on February 2<sup>nd</sup>, Huskamp reviewed the Grievant's cash balancing documents. Although the Grievant's cash box was a dollar off and his paperwork correctly reflected the right amount of transactions, the ten dollars deposited into the Grievant's cash box was not accounted for.

Later that same day, Huskamp added another \$5.00 to the Grievant's cash box. On February 3, 2005, the Grievant's cash box consisted of \$205.00. Although the extra \$5.00 should have been deposited, at least it was not taken and remained in the Grievant's cash box. On February 4, 2005, however, the Grievant's cash box only consisted of \$200.00 even though his paperwork did not show an overage for the \$5.00 deposited into his cash box on February 2, 2005.

On February 11, 2005, Huskamp added \$10.00 to the Grievant's cash box during a routine cash audit at 11:30 a.m. supposedly after the Grievant's break. After the Grievant completed his shift, Huskamp audited his cash box and found that it consisted of \$200.00. His paperwork, once again, did not reflect the \$10.00 added to his cash box.

#### POSITION OF THE EMPLOYER

The Grievant knew that employees are required to "represent the company accurately and honestly" and are prohibited from "engaging in any activity intended to defraud anyone of money, property or services." Nevertheless, even though the evidence demonstrated that the Grievant took the \$25.00 added to his cash box, Huskamp met with him on February 15, 2005 to make sure he understood what to do if his cash box amount exceeded the receipts for the day.

Specifically, Huskamp discussed the “Cashier’s Expectations,” which specifically informed the Grievant that if his cash box was over he was required to deposit the overage amount, and that the failure “to follow the cashier guidelines...could lead to disciplinary action, up to and including termination” with the Grievant.

Despite the fact that the Grievant knew that overages had to be deposited, that he could be terminated for failing to comply with the “Cashier’s Expectations,” and that Abbott specifically prohibited employees from defrauding anyone of money, the next day, on February 16, 2005, the Grievant’s cash box and deposit failed to reflect the \$10.00 added to the Grievant’s cash box earlier that day. Moreover, on March 4, 2005, Huskamp added another \$16.00 to the Grievant’s cash box before his shift. When Huskamp checked the Grievant’s cash box and paperwork from the 4<sup>th</sup>, it showed that the Grievant had once again failed to account for the money added to his cash box. Consequently, after reviewing the evidence produced by the Integrity audit, Huber and Huskamp, after consulting with McKenna, terminated the Grievant’s employment on March 10, 2005 for theft.

Although employees, such as Kadeja Ibrehim, Tigist Tefera and Justina Sargent, correctly reported the money added by Huskamp to their cash boxes, the Grievant was not the only cashier that Abbott discovered not reporting moneys taken from it during the Integrity audit. Cashier Cherinet, whose grievance is currently scheduled for arbitration, stole the cash added by Huskamp on all four occasions. Similarly, evidence also demonstrates that Sandy Frederick, who later confessed to stealing the overage amounts, stole the cash added by Huskamp on all three occasions.

From the time the Grievant was informed that Abbott determined he was stealing through his grievance hearing before McKenna, the Grievant did not deny that he stole the money. Additionally, although he did not specifically admit that he stole the money, the Grievant did offer “to give some of the money back” during the grievance hearing.

At the arbitration, the Grievant testified that he did not steal the money; rather, in defense, the Grievant declared that the “break” cashier, Koshum, stole the money. According to the Grievant, Koshum stole the money because she used his cash box when she relieved him during this breaks and he saw her “roll the register” or hit the subtotal on the till on at least one occasion. Although Koshum did relieve the Grievant on the days that the evidence demonstrates he stole the money added to his cash box, Koshum also relieved other cashiers who were subjected to the Integrity audit. Notably, the Grievant testified that he had no reason to believe that he was being singled out.

Moreover, Huber testified that, Koshum, who is a Local 113 member, has no history of discipline, and that there was no evidence obtained during the Integrity audit or after that suggested that she might be accountable for the missing money.

Abbott had just cause to terminate the Grievant for theft. As previously recognized by the Arbitrator and as impliedly admitted by the Grievant, it is well established that theft constitutes just cause for discharge. St. Francis Regional Med. Ctr. And Minnesota Nurses Association (Arbitrator Flagler, 1988). The dispositive issue in this matter, therefore, is whether

the employer's circumstantial evidence, in light of the Grievant's defense that Koshum stole the money, sufficiently demonstrates that the Grievant engaged in theft.

Here, the evidence produced at the arbitration leads to only one reasonable interpretation – the Grievant stole the money that was added to his cash box during the Integrity audit. On February 1<sup>st</sup>, 2<sup>nd</sup>, and 11<sup>th</sup>, Huskamp added money to the Grievant's cash box, and each time the money disappeared. Despite being warned on February 15<sup>th</sup> that "overages" had to be deposited and that the failure to comply with the "Cashier's Expectations" could lead to termination, the Grievant, who testified that he was angry with Abbott because of his decreased pay, also stole the money that Huskamp added to his cash box on February 16<sup>th</sup> and March 4<sup>th</sup>. Notably, from the time of his termination through the grievance hearing before McKenna, the Grievant never denied stealing the money even though he had the opportunity to do so. In fact, it is undisputed that during the grievance hearing, the Grievant offered "to give some of the money back." Therefore, the evidence unequivocally demonstrates that the Grievant stole the money added to his cash box.

In defense, the Grievant argues that the "Break" cashier, Koshum, stole the money. The falsity of the Grievant's defense, however, is exposed by the exhibits and testimony produced at the arbitration. As Huber testified, cashiers, on average, service up to 400 customers per six hour shift. Although Koshum may have had enough time to hit the subtotal button on the till, she did not have enough time to balance the cash box (i.e., count all the vouchers and the cash) while continuing to help customers during the twenty minutes she relieved the Grievant.

Furthermore, even assuming Koshum could keep an accurate running balance while helping customers during the Grievant's 20 minute break, the invalidity of the Grievant's theory is still exposed by the evidence. On February 3, 2005, the Grievant's cash box balance reflected the \$5.00 that Huskamp placed into it on February 2, 2005 even though Koshum relieved him for his break on February 3<sup>rd</sup>. Thus, why did Koshum not take the money on February 3<sup>rd</sup>? Additionally, on February 11<sup>th</sup>, Huskamp added \$10 to the Grievant's cash box during a routine cash audit after the Grievant's break. Therefore, why was the \$10 still missing if Koshum did not have the opportunity to use the Grievant's cash box later that day? The answer to both questions is that the Grievant, not Koshum, stole the money.

Moreover, the Grievant was not the only cashier that was subject to the Integrity audit. Koshum relieved Frederick, who admitted to stealing the overages in her cash box, on the days that Huskamp added money to Frederick's cash box. Koshum also relieved Sargent on the day she properly recorded and deposited the \$20.00 added to her cash box before her shift. Thus, the evidence demonstrates that the Grievant, not Koshum, who does not have a history of discipline, stole the money.

Finally, the Grievant testified that he had no reason to believe that Koshum or anyone else was trying to single him out. In light of this fact and the evidence discussed above, the only reasonable inference from the evidence provided at the arbitration is that the Grievant acted dishonestly by stealing from Abbott. Therefore, because theft constitutes just cause for termination, the Grievant's grievance should be denied.

## POSITION OF THE UNION

The Grievant has been employed as a parking lot cashier by Abbott Northwestern Hospital since 1998. He was born 60 years ago in Ethiopia, attended an Ethiopian Military Academy and was in the Ethiopian Army for a significant portion of his adult life, attaining the rank of Colonel. He had various assignments including acting as a military attaché at several Ethiopian Embassies and as an accountant/supply officer. He is married and has two adult children. He immigrated to the United States in 1997 and became a U.S. citizen on March 1, 2005.

In 2001, he was the recipient of a liver transplant necessitated by a chronic hepatitis condition. His health has been good since the transplant but he has significant medical bills, primarily to pay for anti-rejection medications.

As a result of an Audit Services Report, the manager of the parking facilities, Randell Huskamp, was instructed to conduct what has euphemistically been described as “integrity checks” of the cashiers in the parking facilities. These “integrity checks” were conducted exclusively by Huskamp, with no assistance and with no witnesses to verify that he actually did what he claims. His absence from testifying at the arbitration hearing was conspicuous and left the Grievant with no opportunity to confront and to cross-examine his accuser. Huber testified that Huskamp is no longer an employee of Abbott Northwestern Hospital but that he was available in the Twin Cities and could have been requested to testify or could have been subpoenaed.

Over the objection of the Union, the Arbitrator allowed Huskamp’s report into evidence but noted the fact that it was hearsay and that it would be given the appropriate weight. The Union requests that the credibility of Huskamp’s report be discounted because it has not been given the test of a healthy cross-examination.

The report indicated that on four occasions, February 2, 11, 16 and March 4, 2005, amounts ranging from \$5.00 to \$16.00 were added to the Grievant’s cash box. At the end of each of the above-listed days, his cash box contained \$200.00 and the bank deposit containing the day’s receipts, did not include the additional cash. The Employer assumes from that fact that on each of those days when the Grievant counted his receipts, he discovered there was extra cash, presumably made by payment errors from customers or the accidental short-changing of customers and that he pocketed the additional cash.

The Grievant did not have exclusive control of the cash box throughout his shift on each of those days. The Employer’s schedule, from January 29, 2005 through March 11, 2005, established that another employee named Koshum, relieved the Grievant for his breaks, three or more times during each of these workdays, and that she had the opportunity to count the money in the cash box and compare that amount with the cash register receipts, and would have been in a position to pocket the excess funds herself. Huber specifically acknowledged that the methodology used by the Employer in its Integrity check did not take into account the relief cashier’s ability to access the funds, as described above. He also acknowledged that the Integrity

check methodology did not include another individual's verification of Huskamp's placement of the funds and his accounting. Huber stated that if he does such "integrity checks" in the future, he will put into place procedures to cover those flaws.

When confronted with the theft allegation, the Grievant was threatened with being turned over to the police for criminal charges. During the questioning, the Grievant denied stealing the funds but did make the statement that if there was a shortage "take it from my check." He testified that making such a statement was not an admission of guilt but because he was fearful of losing his job and possibly being charged with a criminal offense, he offered that as a means of resolving the case.

During his testimony at the arbitration hearing, the Grievant vehemently denied stealing the funds and pleaded for the opportunity to return to his employment, citing his desire to clear his reputation and his inability to find substitute employment, notwithstanding multiple attempts to do so, because of the combination of his age, his medical condition, and the fact that he has honestly disclosed in employment applications that he was fired from Abbott Northwestern for alleged theft.

The Employer has failed to establish by "clear and convincing evidence," that the Grievant stole funds from his cash drawer on four occasions alleged by the Employer.

As the Arbitrator noted in the preliminary discussions prior to taking evidence, because of the nature of the theft allegations against the Grievant, and the potential adverse effect of finding of guilt would have on his reputation and on his employability, the Arbitrator will use the standard of proof of "clear and convincing evidence." That standard is greater than the standard used in most labor arbitration cases, that is, "a fair preponderance of the evidence."

Black's Law Dictionary, 5<sup>th</sup> Ed., (West 1979) defines "clear and convincing proof," as follows:

...The measure of degree of proof which will produce in the mind of trier of facts a firm belief or conviction as to allegations sought to be established; it is intermediate, being more than mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases.

This is a significant burden and it should not be satisfied by uncorroborated hearsay and when there are other reasonable alternatives to the Grievant being the thief.

In this case there are multiple factors which should cast sufficient doubt to cause the Arbitrator to conclude that the Employer has not established the guilt of the Grievant by "clear and convincing evidence." Those factors are:

1. His un rebutted testimony of years of unblemished service as an officer in the Ethiopian Army, as a law abiding citizen of Ethiopia and the United States and as an otherwise excellent and trustworthy employee of the Employer.



2. The fact that Huskamp, who could have been requested to testify or who could have been subpoenaed to testify, did not appear at the arbitration hearing. Because of that failure, the Grievant was denied industrial due process as he was unable to confront and cross-examine the accuser.
3. The methodology used by Huskamp did not provide a witness verification of his placement of the funds and his accounting.
4. The relief cashier, Koshum, had access to the Grievant's cash box on at least three occasions each of the days the money was alleged to be missing, and she had the ability to determine that there was excess cash, the loss of which would not be detected if she pocketed the money herself.

Any one or any combination of those factors is sufficient doubt to require the sustaining of the grievance.

In order to obviate all reasonable doubt regarding the Grievant's guilt, it is incumbent upon the Employer to establish that the person who planted the extra money, who counted the funds at the end of the day, and came to the conclusion that the Grievant had stolen the money, was not himself dishonest, was not himself pre-disposed to make allegations against the Grievant, or was not himself sloppy in how he conducted the investigation. Those serious questions have not been answered by the Employer.

The Employer did not present that person. The only excuse was that Huskamp is no longer an employee. That is not a sufficient excuse for his not being present. He was not requested to testify by the Employer. He could have been subject to the subpoena powers of the Arbitrator. Neither of those alternatives were attempted. Because of that, the Grievant was not able to confront and to vigorously cross-examine his accuser, two of the major factors in determining whether or not someone has been provided industrial "due process."

The Arbitrator should conclude that there is an adverse inference that if Huskamp had been called to testify, his testimony would have been unfavorable to the Employer and favorable to the Grievant. That, in and of itself, should be sufficient doubt for the Arbitrator to rule in the Grievant's favor.

Another gaping hole in the Employer's case is the fact that the relief cashier, Koshum, had access to the Grievant's cash box on multiple occasions, each of the days he is alleged to have taken the excess funds. The cashier's work schedule for the period between January 29 and March 11, 2005 clearly shows that Koshum was scheduled to work on each of the days the alleged thefts occurred.

It was acknowledged by the Employer that for periods of from 15 minutes to 30 minutes at a time, Koshum was alone in the Grievant's cashier's booth, with access to his cash box. It was also acknowledged that she had the ability, simply by pushing the subtotal button on his cash register, to determine what the total receipts were up to that point. All she had to do was count the money that was in the cash box, knowing that each cashier began the day with \$200.00.

She could easily determine whether there was excess cash in the box and she could have easily pocketed that money.

The Employer will presumably argue that if she was the thief, why didn't she steal from the other cashiers? The Union responds to that anticipated argument by stating that she could very easily have targeted the Grievant because she perceived him to be old, and sick, and would not have been as likely to catch the fact that she took the money as the younger cashiers would. Furthermore, at least one other cashier's deposits were short. Fikre Cherinet, another employee of Ethiopian descent, was also terminated for theft. She may have targeted the two Ethiopian cashiers and not the other cashiers for some unexplained bias reason.

We also anticipate that the Employer will argue that because cashier Sandy Frederick failed the "integrity check" and admitted her guilt, that somehow proves that Koshum is not a thief. All that fact proves is that there were two thieves, exactly what the Employer asserts with regard to the Grievant.

The point is, it is just as likely that Koshum is the thief as it is that the Grievant is. That possibility should create doubt sufficient for the Arbitrator to conclude that the Employer has not sustained its burden of proof of proving the Grievant's guilt by "clear and convincing evidence."

## DISCUSSION AND OPINION

This review begins with the affirmation of the "clear and convincing" evidentiary standard as that applicable to the charge of theft as the grounds the Employer cited as just cause for the decision to terminate Petros' employment. In cases involving circumstantial evidence, as in the instant matter, clear and convincing proof means that the inferences as may be drawn from such evidence must not be equally logical, i.e., equivocal, but instead must stand as substantially the more reasonable than alternative inferences which might be deduced.

When the substantially more logical inferences are thus drawn and the less likely rejected, then it can be said that the arbitrator may find such proof convincing rather than merely suggestive. With this definition in mind, the record evidence will now be analyzed.

The state of the record reveals, according to Huskamp's documentation including his receipts for money used in the Integrity audit, the following assertions:

February 1, 2005, he added \$10.00 to the Grievant's cash box. Before his next shift, inspection of his balancing documents reflected the right transactions but the \$10.00 added to his cash box was gone and not accounted for.

Later on February 2, Huskamp added \$5.00 to the Grievant's cash box. The next day his box contained \$205. Although the extra \$5.00 should have been deposited, at least it was not taken.

On February 4, however, the Grievant's cash box contained only \$200.00. The extra \$5.00 was gone and his paperwork did not show the earlier overage of the \$5.00.

On February 11, Huskamp added \$10.00 to the Grievant's cash box during a routine cash audit at 11:30 after the Grievant's break. At the end of his shift, his paperwork did not account for the extra \$10.00 which was by then missing.

On February 15, Huskamp met with the Grievant and informed him that if his cash box was ever over he was required to deposit the overage amount and that failure to follow cashier guidelines could lead to disciplinary action up to and including discharge.

Despite these instructions and warning the next day, February 16, the Grievant's cash box and deposit failed to account for \$10.00 Huskamp had added to his box earlier that day.

On March 4, Huskamp added the somewhat odd amount of \$16.00 to the Grievant's cash box before his shift and when he later checked the Grievant's paperwork and cash box, the \$16.00 was missing and not accounted for.

Standing alone, this exposition of proffered evidence would make a strong *prima facie* case. The Union correctly points out, however, that the Employer's Integrity audit contains significant flaws, including the fact that the author of this documentation was not presented by the Employer to verify the authenticity of his reports or to face cross-examination regarding the validity of the information recorded therein.

Specifically, argues the Union, the assertion that Huskamp actually put the extra money into the Grievant's cash box cannot be challenged in the absence of the declarant and thus his records, Employer Exhibit 3, constitute mere hearsay. Indeed, suggests the Union, the possibility that Huskamp simply pocketed the missing funds and fabricated the reports to Huber cannot be discounted by anything in the evidentiary record.

It should be noted at this point that the so-called Integrity audit, as conceived and executed, was significantly flawed. I have arbitrated dozens of discharge cases involving sting operations and must observe that an elemental feature of successful setups – missing in the instant matter – is some solid means of establishing that the bait was in fact in the trap before later trying to prove it had gone missing.

I rejected the Union's vigorous objection to receiving Huskamp's reports into the record at the time the Employer offered these through a witness who was not the author of the documentation. I indicated for the record that while clearly hearsay, I would look to the Employer to produce some independent support for the reports – without which the proffered evidence would lack substantial probative value.

Further review of the record discloses that the Employer did in fact produce independent evidence to support the assertion that Huskamp, in all likelihood had salted the Grievant's cash box in the amounts and the dates recorded in his reports. Specifically, Ms. Frederick's confession confirmed that Huskamp had placed the extra monies in her cash box which she

admitted to stealing. In like vein, the three other named cashiers whose cash boxes were salted with extra funds all duly deposited and accounted for such overages.

These separate cashiers' acknowledgements each corresponds exactly with the cash receipts signed by Huskamp (Employer Exhibit 4). One can safely assume that the Union in its investigation of the matter would have confirmed these facts with the three bargaining unit members who were among those randomly selected for the audit but found faithful to their obligations.

This leaves only the possibility that Huskamp for some reason – personal gain, personal animus, or inadvertence – had never salted the Grievant or co-worker Cherinet's cash boxes as claimed by the Employer. Each of these possibilities can be subjected to straightforward tests of reasonableness.

The suggestion that Huskamp may have pocketed the money and fabricated the receipts for the dates in question does not withstand even limited probing. In plain truth the Union conceded at the hearing that it had no reason to believe Huskamp stole the missing funds. Neither does it make sense that a person receiving a supervisor's salary would jeopardize his job and reputation for such trivial amounts.

As for any possible animus related to the fact that both discharged cashiers are immigrants from the same country, such proposition is so remote as to warrant no serious consideration. Neither was any evidence presented to suggest personal animus held by Huskamp toward the Grievant on any other ground.

Finally, inspection of Huskamp's contemporaneous notes and reports reveal a careful implementation of his role in the Integrity audit. Absolutely nothing in these documents would support the possibility of not even one much less multiple errors of inadvertence or sloppiness to support the Union's suggestion that Huskamp carelessly failed to place the extra monies in Petros' cash box.

Based on the foregoing analysis, Huskamp's records and reports are hereby accepted into the record. It must not pass without comment that the Employer's failure to produce the Grievant's chief accuser represents a due process error that under some circumstances, not present in this case, would have proved fatal. Under the applicable harmless procedural error principle, the outcome in this case was not affected by Huskamp's absence. Huber's testimony sufficed to support Huskamp's records as authentic and accurate.

The reasons the Grievant suffered no material prejudice by not facing his accuser lie in the highly limited inferences which could be logically drawn from the circumstantial evidence presented through Huber's testimony above. As Hill and Sinicropi observe in their oft-quoted Evidence In Arbitration<sup>1</sup> "circumstantial evidence can be a fully probative device."

Echoing this proposition, I wrote in a recent decision:

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<sup>1</sup> BNA Books on Arbitration, Washington, DC (1980).

[C]ircumstantial evidence can be even more reliable and instructive than direct evidence which may be subject to the various defects in direct eye witness testimony. The key to probative value of circumstantial evidence lies in the strength of the inferences that may be drawn from such evidence. If only one truly reasonable inference can be drawn then it may be found that the circumstantial evidence is powerful. Where more than a single inference may be drawn, then deferential weight must be given to the most probable over the less likely inferences available.<sup>2</sup>

In sum, the single inference that Huskamp salted the Grievant's cash box accords squarely with the facts known without direct reference to Huskamp's receipts and reports. These merely reinforce that inference. By contrast, it takes a highly unlikely stretch of imagination to conclude from the provable circumstances that Huskamp set up the three cashiers whose accounts were short the exact amount of the excess funds on the corresponding dates when these monies were planted.

This review now turns to the alternative prong of the Grievant's defense – that the break cashier Ms. Koshum had ready access to the Grievant's cash box with adequate time to determine the amount of excess money it contained and to steal this exact amount. To credit such proposition it must be assumed in the first instance, that Ms. Koshum stole the exact amount planted, selectively from Petros and perhaps Cherinet, while sparing Ms. Fredericks who stole on her own impulse in addition to the other three cashiers who never stole from their accounts – an improbable scenario on the face of the matter.

As unlikely is the foregoing speculation, its slim possibility dissolves, however, when its predisposing assumptions are examined. The primary of these assumptions proposes that Koshum had plenty of time to hit the subtotal on the till then balance the cash box to determine any overage and to pocket that difference. The sheer volume of traffic through the cashier lanes strongly suggests that stealing the exact amount planted on each of the particular dates the sting was in operation would pose a formidable exercise for a break cashier.

The undisputed testimony places the average traffic count for each cashier at 400 vehicles per six hour shift – a flow of more than one payment, receipt and change making transaction per minute. This means that, while counting the cash and vouchers in the register, Ms. Korshum would have had to keep a rolling account of the balance after each of these transactions. Moreover, to have consistently pocketed the correct overage on the date of each theft, Korshum would probably have needed to conduct this search for extra cash during each and every break period day in and day out.

Such a tedious exercise would make Ms. Korshum a quite dedicated thief. This scenario falls into the realm of the possible but highly improbable.

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<sup>2</sup> University of Minnesota Med Ctr. and AFSCME Council 5, p. 16 (2005).

Further, the suggestion that Ms. Korshum should be held to equal suspicion as the Grievant fails to square with the evidence that his cash box balance reflected the \$5.00 planted on February 2 and was still there on February 3 after Ms. Korshum relieved him. Neither does the fact that the \$20.00 salted in Ms. Sargent's cash box was properly accounted for on the day Ms. Korshum relieved her. The facile but unpersuasive explanation would appear to be that Ms. Korshum only stole occasionally, apparently only when money was missing from the Grievant's (and perhaps Cherinet's) cash box. This speculation lacks merit.

#### DECISION

Based on the foregoing analysis and conclusions, the grievance is denied.

5/26/06  
Date

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John J. Flagler, Arbitrator